

PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN

Applicant	Miss M Blakey
Scheme	NHS Pension Scheme (the Scheme)
Respondent(s)	NHS Business Services Authority (the Authority)

Subject

Miss Blakey's complaint is that she has been refused the early release of her pension benefits on grounds of ill health.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint should be upheld against the Authority because there has not been a proper assessment of Miss Blakey's incapacity as there are too many shortcomings in the Scheme's Medical Advisor's reports for the Authority to have reasonably accepted their Medical Advisor's opinion and turned down Miss Blakey's application.

DETAILED DETERMINATION

The National Health Service Pension Scheme Regulations 2008 (the Schemes 2008 Regulations)

1. As relevant regulation 2.D.10 says:

“(1) A deferred member who has not reached the age of 65 is entitled to immediate payment of a pension that is payable for life if-

(a) in the opinion of the Secretary of State the member suffers from physical or mental infirmity as a result of which the member is permanently incapable of engaging in regular employment of like duration, and

(b) the member has claimed the pension.”

Material Facts

2. Miss Blakey was a part-time senior nurse advisor at NHS direct and a 2008 member of the Scheme. Following an extended period of sickness absence she was dismissed on grounds of capability in November 2011. In April 2012 (then age 47) she applied for the early release of her pension on grounds of ill health (chronic abdominal pain).
3. The Authority referred Miss Blakey’s application to their Medical Advisers (Atos Healthcare – **Atos**). Dr Scott (for Atos) advised:

“A deferred member is assessed as having physical and mental infirmity that makes him permanently incapable of regular employment of like duration.

“Permanent” means to normal benefit age 65.

...

The applicant [Miss] Blakey, is a 48 year old former part time (22.5 hours/week) NHS employee.

....

This woman has abdominal pain which has been exhaustively investigated to no avail. Despite full investigation no cause has been found. She has been referred to the Pain Clinic, and appears, according to her GP’s most recent entries, to be improving a little. As there is still nearly 12 years to go to normal benefits age, it is not possible to accept permanent incapacity for any part time employment with no evidence of any pathology, and some response to Pain Clinic measures.

The evidence does not indicate that the applicant is, on the balance of probabilities (more likely than not) permanently incapable of regular employment of like duration.”

4. Atos (acting on behalf of the Authority) duly turned down Miss Blakey’s application and notified the Authority.

5. In August 2012 Miss Blakey appealed invoking the Scheme's two-stage internal dispute resolution (**IDR**) procedures. In her stage one appeal she said:
 - her condition had not improved it was worsening and no pain relief she had been given had actually worked;
 - pain clinic measures (increased dosage of Amitriptyline, a 6 week persistent pain course; continuing to do yoga, pilates and swimming for the past 6 months and 2 recent injections into the muscle of her abdomen) had had no effect;
 - basically she had been told by all doctors that "there is no magic wand" and she would have to "learn to live with the pain".
6. Atos requested Miss Blakey's GP to provide "copies of medical records, treatment records, investigation findings and correspondence relevant to [her condition] for the period from April 2012 to the present date". On reviewing these, Dr Chapman (for Atos) gave her opinion to the Authority that Miss Blakey was not permanently (to age 65) incapable of work of like duration:

"Miss Blakey is currently unfit for work because of symptoms of abdominal pain. She has been exhaustively investigated for this and no cause has been identified. When assessed by Dr Menon, Locum Consultant Anaesthetist, Pain Management Service on 16/03/2012 he considered that the most likely cause of her symptoms was post-surgical pain following an abdominoplasty operation. He also noted that she was having mood swings. He advised continued exercise and an increase in medication. She was reviewed by Dr Baranidharan, Consultant in Pain Management on 7th August 2012. He elicited a history that the symptoms had developed 2 years before after a Pilates class. Dr Baranidharan wondered if she had traumatised a muscle and has injected the muscles with a combination of local anaesthetic and steroid.

As she continues to be actively treated with expectation of improvement in her symptoms it is considered to be premature to accept that she will remain unfit for part-time (22.5 hours per week) employment for the next 17 years. It is therefore advised that the medical criteria for the early payment of preserved benefits are not met."

7. The Authority accepted Dr Chapman's opinion and turned down Miss Blakey's appeal. Miss Blakey invoked IDR stage 2 and in her appeal letter, amongst other things, said:
 - she had not responded to any pain team treatment;

- the most recent treatment (pulsed frequency treatment) had to date not improved her condition;
 - Dr Baranidharan had advised her that if the treatment failed they would be back to square one and no nearer providing any pain relief;
 - she had done everything she had been asked to do by the medical professionals but to no avail;
 - there was no sign of any treatment that would make it possible for her to work in the foreseeable future;
 - medications made her drowsy and unable to concentrate;
 - she was now suffering from depression due to her on-going health problems.
8. Atos proposed a three months deferment as Dr Baranidharan was due to see Miss Blakey for a reassessment:
- “Since the issue in this case is the scope for any improvement with further reasonable treatment, it is her pain specialist who must provide advice on this.”
9. The Authority agreed and informed Miss Blakey that her case would be reviewed again in 3 months’ time. After 3 months Atos recommended the review be put on hold for a further 3 months as Miss Blakey had recently undergone further investigations and was awaiting a follow up appointment with Dr Baranidharan:
- “Dr Baranidharan should be able to provide further information at that point, in order to clarify whether appropriate treatment is likely to bring about sufficient improvement in the applicant’s health and functional status, to enable her to undertake regular employment of like duration prior to normal benefit age.”
- The Authority agreed and informed Miss Blakey.
10. Approaching the end of the second three months deferment Atos, amongst other things, asked Dr Baranidharan:
- to indicate what further interventions were available and which were planned with expected response;
 - what was the likely future course of Miss Blakey’s health and function to age 65;

- was further treatment likely to bring about sufficient improvement in her health and functional status to enable her to undertake sedentary employment of like duration (22.5 hours per week) before age 65?

11. Dr Baranidharan respectively replied:

- “Miss Blakey had been referred to a psychologist for pain management with either a pain management programme or coping strategies;
- As far as I can see since being referred she has not made any positive steps towards getting better. She may not be in a position to do her current job but this needs an occupational assessment, this is based on the report given by the patient following treatments;
- This unfortunately is not going to be easy as she is currently struggling and any pain management intervention we have performed has not made any improvement.”

12. Dr MacCarthy (another Atos doctor) gave his opinion to the Authority that Miss Blakey was not permanently incapable of work of like duration to her NHS duties:

“She has a three-year history of abdominal and back pain. She has been extensively investigated and a mechanism appears to have been identified. A pain management specialist states that she has two problems: abdominal wall pain and neuropathic leg pain. She is to be referred to a psychologist for further assessment and treatment. The specialist is not able to provide definitive comment on her fitness or on her outlook.

In summary, physical treatments for her symptoms have not thus far been effective and she is awaiting psychological intervention. As she is awaiting further input to assist her with managing her pain, and in light of her relatively young age, there remains a reasonable prospect that she may improve to a level sufficient to be able to undertake work in some capacity on a part-time basis in the 16 years prior to her normal retirement age.”

13. The Authority accepted Dr McCarthy’s opinion and turned down Miss Blakey’s final appeal.

Summary of Miss Blakey's position

14. Miss Blakey says:

- She has tried every medication offered but none ease her constant pain (which is throughout her abdomen, lower back, right hip and pelvic area. She also has intermittent pain in her legs).
- She has been discharged by the Pain Management Clinic who said there was nothing else they could offer her in terms of treatment and she is no longer being investigated.
- She was referred to and has recently seen (in February 2014) a Clinical Psychologist, but has been discharged with no further appointments.
- She has previously seen various other specialists but to no avail.
- Her GP has stated verbally to her that she has nerve damage and if surgery had been an option she would have been advised of this by the neurosurgeon who reviewed her June 2013 MRI scan. She has also been told that acupuncture or physiotherapy would not help.
- The Authority have repeatedly made a mistake referring to the wrong regulation number and that permanency is to age 60 (instead of 65). How can they be sure that this mistake has not affected their consideration of her claim?
- She feels insulted by the Authority's offer of £100 for this.

Summary of the Authority's position

15. The Authority say:

- "The issue here, in the absence of a definitive diagnosis or any cause being found for [Miss Blakey's] pain and in the presence of ongoing further investigations and treatment, is a difference of opinion between NHS Pensions and Miss Blakey as to the permanency of her inability to efficiently carry out any work of like duration...whilst she is still being investigated and is still trying various treatment options, [the Authority] has been unable to conclude that Miss Blakey is permanently incapable of regular work of like duration (22.5 hours a week) for the next 16 years or so."

- In some of the letters to Miss Blakey and to her treating doctors requesting medical information the applicable regulation number and the measurement of permanency was misquoted. Whilst this did not materially affect the consideration of Miss Blakey's claim or the outcome (the correct test details were included in Atos doctors' rationales at both IDR stages) in recognition of any distress and inconvenience caused by these erroneous references the Authority are offering Miss Blakey £100.
- Nevertheless, their decision to turn down Miss Blakey's application is not perverse.

Conclusions

16. I start by saying that my role in this matter is to decide whether the Authority have correctly applied the Scheme's 2008 Regulations, considered all relevant information and reached a decision which is not perverse. By perverse I mean a decision which no other decision maker, properly advising themselves, would come to in the same circumstances.
17. To qualify for the early release of her deferred pension benefits Miss Blakey, on the balance of probability, must be incapable to age 65 of working at least 22.5 hours per week.
18. The initial decision taken by Atos incorrectly considered permanency to age 60, rather than to age 65, but nothing turns on this as it is less stringent than the applicable test and at appeal permanency was considered to age 65.
19. Nevertheless Dr Scott's opinion that it was not possible to accept permanent incapacity "for any part time employment with no evidence of pathology, and some response to Pain Clinic measures" is flawed. The test is not dependant on a particular diagnosis or cause for Miss Blakey's pain, "any part time employment" is incorrect, it must be employment of like duration, and "some response" to treatment does not go far enough, it must be considered whether the improvement is likely, on the balance of probability, to mean that Miss Blakey fails the test.
20. Whilst Dr Scott previously noted that Miss Blakey had worked 22.5 hours per week and finished his report by concluding that the evidence did not indicate that Miss Blakey was permanently incapable of work of like duration his reference to

“any part time employment” in between both statements clouds whether he correctly understood what was meant by “employment of like duration” and Atos do not appear to have clarified this matter with Dr Scott before deciding to turn down Miss Blakey’s application.

21. At the first appeal stage the Authority accepted the opinion of Dr Chapman. Dr Chapman referred to Dr Menon’s March 2012 report that the most likely cause of Miss Blakey’s symptoms was post-surgical pain following an abdominoplasty operation, but did not mention Dr Ebal’s (ST5 in Obstetrics and Gynaecology) comment (in his February 2012 report) that Miss Blakey had been investigated by surgeons who felt her pain was not as a result “of adhesions following her abdominoplasty”.
22. In her conclusion Dr Chapman says “as she continues to be actively treated with expectation of improvement”. Whilst Miss Blakey was receiving treatment it is not clear from Dr Chapman’s report or from the medical evidence available at that time the basis on which Dr Chapman makes that comment. In giving her opinion Dr Chapman failed to clearly identify the treatment(s) she was referring to and why she was of the opinion that improvement could be expected and the Authority does not appear to have queried either matter with Atos before deciding to turn down Miss Blakey’s appeal.
23. Nevertheless Dr Chapman’s opinion is deficient because “an expectation of improvement” falls short of giving an opinion on whether the outstanding treatments were likely to enable Miss Blakey to be capable of work of like duration before age 65. The Authority failed to ask this question before turning down Miss Blakey’s appeal therefore they did not know whether the expected improvement was likely to mean that Miss Blakey was not permanently incapable of work of like duration.
24. Turning now to the second appeal. Dr McCarthy, in his report to the Authority, says that Dr Baranidharan is “not able to provide definitive comment” on Miss Blakey’s fitness or on her outlook. But a definitive comment was necessary.
25. Dr McCarthy concludes that as Miss Blakey is awaiting further input to assist her with managing her pain and because of her relatively young age there remains a reasonable prospect that her condition may improve sufficiently to enable her to undertake work “in some capacity on a part-time basis in the 16 years prior to

her normal retirement age.” But again that does not go far enough. Dr McCarthy has not given his opinion on the likelihood of the psychological intervention enabling Miss Blakey to undertake work of like duration before age 65 or explained why he is of that opinion. The Authority do not appear to have queried the matter before deciding to turn down Miss Blakey’s final appeal.

26. I therefore direct below that the Authority should consider afresh Miss Blakey’s 2012 application.
27. This whole matter has inevitably caused Miss Blakey distress and inconvenience, which I have recognised in my below directions.

Directions

28. To put matters right:
 - Within 42 days of the date of this determination the Authority shall consider wholly afresh Miss Blakey’s application for the early release of her deferred pension on grounds of ill health.
 - If the Authority uphold Miss Blakey’s request her pension entitlement should be backdated to the date of her application and simple interest at the rate for the time declared by the reference banks from the due date to the date of payment should be added to the backdated instalments of pension and any lump sum entitlement.
 - Within 10 days of the date of this opinion the Authority shall pay Miss Blakey £150 in addition to the £100 already offered.

Jane Irvine
Deputy Pensions Ombudsman

1 August 2014